



The Comptroller General
of the United States

Washington, D.C. 20548

Arnold PL-II

Decision

Matter of: Custom Training Aids, Inc.

File: B-224868

Date: February 6, 1987

DIGEST

1. Protester need not anticipate improper actions by agency officials. When agency awards a contract to an allegedly nonresponsive bidder basis of protest is contract award, and protest must be filed within 10 days after the basis for protest was known or should have been known, whichever is earlier.
2. Where agency has in its possession missing attachments to a protest and is not prejudiced by protester's failure to supply those attachments within 1 day of protest filing, no useful purpose would be served by dismissing protest after timely receipt of agency report.
3. Bidders need only submit with their bids descriptive literature sufficient for the stated evaluation purpose. Where solicitation requires engineering drawings of manufacturing quality to be used only to determine functional operability, sketches demonstrating functional operability are sufficient.

DECISION

Custom Training Aids, Inc. (CTA), the incumbent contractor, protests the award of a contract to Technical Plastics Corporation (TPC) under invitation for bids (IFB) No. DABT60-86-B-0133, issued by the Department of the Army for the supply of combination smoke and inert training mines. CTA complains that TPC furnished insufficient descriptive literature and its bid therefore is nonresponsive. We deny the protest.

Bids were opened on August 8, 1986, and the contract was awarded on August 27. CTA protested to the contracting officer on August 29, and the contracting officer mailed his reply denying the protest on September 16. On October 3, CTA filed its protest in our Office.

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At the outset, the Army points out that an initial protest to the agency must be filed within 10 working days after the basis for protest was known or should have been known, whichever is earlier, 4 C.F.R. §§ 21.2(a)(3) and 21.2(a)(2) (1986), and argues that CTA knew or should have known that TPC's descriptive literature did not meet CTA's interpretation of the solicitation requirements when bids were opened on August 8. The Army contends that CTA's protest to the contracting officer on August 29 and the subsequent protest to our Office are untimely. In response to the Army's arguments, CTA contends that it was not until the Army accepted TPC's bid on August 27 that CTA had a basis for its protest.

We agree with CTA. We do not require prospective protesters to file "defensive" protests before actual knowledge that a basis for protest exists or in anticipation of improper actions by the contracting agency. Gulton Indus., Inc., Engineered Magnetics Div., B-203265, July 20, 1982, 82-2 CPD ¶ 59. Further, with regard to CTA's filing in our Office, our Bid Protest Regulations provides that if an initial protest has been filed timely with the contracting agency, we will consider a subsequent protest to this Office if it is filed within 10 working days after formal notification of, or actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a). Absent evidence otherwise, we assume that it takes one calendar week for mail to arrive. See Mammoth Firewood Co., B-223705, Sept. 4, 1986, 86-2 CPD ¶ 261. Here, even if the Army's September 16 denial of CTA's protest was received by CTA as early as September 19, CTA's filing of its protest in our Office on October 3 was timely. Since there is no evidence that the Army's September 16 letter was received by CTA earlier than September 19, we have no basis to view the protest as untimely.

The Army also complains that CTA failed to furnish the Army with copies of the attachments referenced in its protest to our Office. The Army argues that our Bid Protest Regulations, 4 C.F.R. § 21.1(d), require that a copy of the protest to our Office be received by the contracting officer within one day of the date it is filed with our Office, and that CTA's protest should be dismissed.

Our Regulations provide that a protest may be dismissed where the requirement of Section 21.1(d) is not met; they do not require dismissal. See 4 C.F.R. § 21.1(f); Contemporary Roofing, Inc., B-222691, June 2, 1986, 86-1 CPD ¶ 510. Here, the Army filed its administrative report on the protest in a timely manner and never informed our Office prior to the submission of its report that the contracting officer failed

to receive a complete copy of the protest. In fact, the Army admits in its report that it had copies of all the attachments in its files. Under these circumstances, it is clear that the Army's ability to meet the 25-day statutory deadline for filing its report was not impaired. Dismissal of the protest under these circumstances would serve no useful purpose. Contemporary Roofing, Inc., B-222691, supra. We will therefore consider the protest on its merits.

The solicitation required either a bid sample or descriptive literature and referenced the standard clauses regarding these requirements in the Federal Acquisition Regulation, 48 C.F.R. §§ 52.214-20 and 52.214-21 (1985). In addition, the solicitation also stated that descriptive literature must be in the form of the following:

"Engineering drawings (manufacturing quality) showing all materials/components, design details required for the fabrication of the mine which would be delivered under any resultant contract."

The IFB further provided that the bid samples/descriptive literature would be evaluated to determine whether or not the product which the bidder proposes to furnish is functionally operable for the purpose intended, i.e., combination smoke and inert mine.

CTA submitted a bid sample, and TPC, along with the other bidders, submitted descriptive literature containing drawings. CTA contends that the drawings TPC submitted with its bid failed to conform with the requirement for engineering drawings (manufacturing quality) because they omitted dimensions, scales and allowable tolerances. We disagree.

We have held that bidders need only submit with their bids the descriptive literature necessary for the stated evaluation purpose and any requirement for additional or more precise data must be viewed as being for informational purposes, not affecting the responsiveness of the bid. Patterson Pump Co., B-216133 et al., Mar. 22, 1985, 85-1 CPD ¶ 333; see also Tenavision Inc., B-221540, Apr. 21, 1986, 86-1 CPD ¶ 387. Further, we will not disturb an agency's determination concerning the adequacy of required descriptive literature absent a clear showing of unreasonableness, abuse of discretion, or a violation of procurement statutes and violations. DeVac, Inc., B-224348.2, Sept. 3, 1986, 86-2 CPD ¶ 254.

In this case, the solicitation stated that the only purpose for the descriptive literature was to determine whether or not the product which the bidder proposed to furnish was "functionally operable" for the purpose intended. Since the specification only left certain parts of the mine for the bidders to design, and specified dimensions and design characteristics for the other parts, the Army viewed TPC's drawings in conjunction with the specifications for the mine as establishing the necessary basic dimensions and operability of TPC's design. On their face, the Army's actions appear reasonable and CTA has failed to provide any evidence to show otherwise except to say that the drawings were not sufficient to manufacture tooling for the mine. The purpose of the descriptive literature requirement, however, was not to obtain data and diagrams from which such tooling could be manufactured, and there is no indication that absent such drawings the Army would be unable to determine the overall feasibility of TPC's design. For the purpose of determining whether the actual mine complies with the specifications, we note that the IFB provides for a preliminary inspection of the first 3 mines during performance at the contractor's plant. We therefore find no merit to the protest that TPC's descriptive literature was insufficient.

The protest is denied.

for Seymour Efron
Harry R. Van Cleve
General Counsel